execution in the circumstances in the interests of the first, second and fourth defendants and the intervener.

Counsel for the plaintiff had also applied for a postponement as regards the fact that two of the properties had been redeemed after the application, which fact I had disregarded earlier when informed by counsel for the first, second and fourth defendants and the intervener, but since the plaintiff had made a formal application to amend the order for sale, which is now pending, my view was that the orders for stay would also enable them to sort out the situation as regards the other properties charged.

Order accordingly.

Solicitors: *Joseph Tan & Tang; Asbir, Hira Singh & Co.*

Reported by *Yap Shao Sin*

Kandasamy a/l Sreenivasagam v Syarikat Muzwina Development Sdn Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO 22-210-88
ABDUL MALEK J
28 AUGUST 1989

Civil Procedure — Jurisdiction of registrar to hear application for specific performance — Rules of the High Court 1980, O 1 r 4 & O 81

Land Law — Agreement for sale and purchase of property — Liquidated damages to date of possession — Dispute as to date of possession

The plaintiff had agreed to purchase a piece of property from the defendants in April 1985. A sum of $26,000 had been paid towards the purchase price of $42,250 while a sum of $16,000 had been withheld as the plaintiff claimed a right of set-off. Vacant possession was to be delivered to the plaintiff within 24 months of the agreement, failing which liquidated damages, calculated from day to day at 10% pa of the purchase price, was payable immediately to the plaintiff. Water and electricity were put in on 2 February 1989. The plaintiff applied for judgment, contending that his claim was for vacant possession and liquidated damages from 1 April 1987 to 2 February 1989. The defence contended that the plaintiff was not entitled to possession as that was subject to the issue by the defendants' architect of a certificate of completion and the plaintiff having paid all instalments of purchase price and other moneys due. Further, the house was completed on 23 January 1988 and the plaintiff had to pay the amounts due before that and a sum of $15,249.02 was still due from the plaintiff. The period for the liquidated damages should be from 1 April 1987 to 14 days after 23 January 1988. The senior assistant registrar remitted the case to a judge as she agreed with the defence that she had no jurisdiction to decide as it involved specific performance for the sale and purchase of property.

Held, allowing the plaintiff's application:

(1) As the parties have agreed to various matters including the setting off of the liquidated damages from the balance of the purchase price, the only issue was the period of the liquidated damages that was to be calculated. As counsel for the parties left it to the court to decide, the relevant date which liquidated damages should run to was 2 February 1989, the date when water and electricity were installed.

(2) The plaintiff was to pay the balance due to the defendants after setting off the liquidated damages and interest due to the plaintiff as provided under the agreement and the defendants are to provide the keys after payment has been made.

(3) The learned senior assistant registrar may have been in error as applications for specific performance falls under O 81 of the Rules of the High Court 1980 and O 1 r 4(2) provided that the 'Court' means the High Court or any one or more judges thereof, whether sitting in court or in chambers, or the registrar.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02-312 of 1989.]

Cases referred to

1 *SEA Housing Corp Sdn Bhd* v *Lee Poh Choo* [1982] 2 MLJ 31 (folld)
2 *Loh Wai Lian* v *SEA Housing Corp Sdn Bhd* [1987] 2 MLJ 1 (folld)
3 *Syarikat Lean Hup (Liew Brothers) Sdn Bhd* v *Cheow Chong Thai* [1988] 3 MLJ 221 (folld)

Legislation referred to

Rules of the High Court 1980 O 1 r 4, O 81

Lalchand N Thadani for the plaintiff.
Yap Foo Ken and *Meor Sha'azizi bin Meor Shaari* for the defendants.

Cur Adv Vult

Abdul Malek J: The plaintiff had applied by way of summons-in-chambers filed on 7 January 1989 for an order that the plaintiff be at liberty to enter final judgment against the defendants as per the statement of claim dated 23 November 1988, or such order as may be made in the circumstances, and that the defendants do pay the costs.

Applications like these are normally dealt with by the senior assistant registrar but when the matter came up before her, learned counsel for the defendants had argued that she had no jurisdiction to decide as it involved specific performance for the sale and purchase of property. Despite learned counsel for the plaintiff's submission that this was only an application for vacant possession, the learned senior assistant registrar had agreed with counsel for the defendants and had remitted the case up to me.

The learned senior assistant registrar may have been in error here as applications for specific performance of an agreement fall under O 81 of the Rules of the High Court 1980 where the word 'Court' is used. Order 1 rule 4(2) of the Rules provides that 'Court' means the High Court or any one or more judges thereof, whether sitting in court or in chambers, or the registrar.

The plaintiff had prayed for the following orders in his statement of claim filed on 25 November 1988:

a) an order that the defendants do forthwith provide the keys of the house on HS(D) Ka 6033/85 PT No 62417, Mukim of Ulu Kinta, failing which the plaintiff be at liberty to break open and enter into possession of the said property;
b) an order that the defendants arrange for water and electricity connection for the said property;
c) (i) balance liquidated damages of $728 as at 31 October 1988 and interest at 8% pa from 1 November 1988 till repayment in view of set-off of $6,000;
(ii) daily liquidated damages of $11.60 from 1 November 1988 till vacant possession with electricity and water and interests on liquidated damages at 8% pa from 1 November 1988 till repayment;
d) costs; and
e) such further or other relief.

Learned counsel for the plaintiff had submitted that:

a) the plaintiff was applying for vacant possession and liquidated damages;
b) the plaintiff is the registered owner since 22 October 1986;
c) the sale and purchase agreement dated 1 April 1985 between the parties had stated that the purchase price of the property is $42,250 out of which about $26,000 had been paid to the defendants and $16,000 had been held back by the plaintiff as a right of set-off from which amount $9,000 was with the plaintiff's counsel;
d) clause 18 of the said agreement had provided that vacant possession was to be delivered to the plaintiff within 24 calendar months of the date of the agreement failing which the defendants were to pay immediately to the plaintiff liquidated damages calculated from day to day at the rate of 10% pa of the purchase price;
e) liquidated damages should be from 1 April 1987 up to the date of possession;
f) water and electricity had been put in on 2 February 1989 and that counsel was agreeable to accept this date as the date of possession;
g) there must be a certificate from the architect before payment can be made; and
h) the defendants were entitled to interest for the late payments.

Learned counsel for the defendants had replied that:

a) the plaintiff, as owner, is not entitled to possession as that is subject to the issue, by the defendants' architect, of a certificate of completion and the plaintiff having paid all instalments of the purchase price and other moneys due;
b) he conceded that the plaintiff is entitled to set off damages from the balance of the purchase price;
c) the roads and drains were completed only in June 1987;
d) the house was completed on 23 January 1988 and that the plaintiff had to pay the amounts due before that, namely, the 15% of the purchase price amounting to $6,000;
e) there is an application for extension of time to the Comptroller of Housing made on 22 July 1988 but for which no reply had been received although his officers had come to investigate;
f) the defendants did not agree to the plaintiff taking possession as $15,249.02 was still due from the plaintiff;
g) the period for liquidated damages should be from 1 April 1987 up to 14 days after 23 January 1988, but left it to the court to decide as to whether it should be up to 2 February 1989 when water and electricity were put in; and
h) triable issues had been raised.

Upon a review of the submissions, the court found that as a matter of fact several matters had been agreed to by both counsel including the setting off of the liquidated damages from the balance of the purchase price, the payment of interest for the late payments and that, although learned counsel for the plaintiff had asked that the period of calculation of liquidated damages be up to the date of actual possession and that learned counsel for the defendants had argued that it should end 14 days after 23 January 1988, which was the date of the defendants' notice to the plaintiff for non-payment of the moneys due, both counsel had left it to the court to decide whether the period should actually end on 2 February 1989 when water and electricity were installed.

I shall, therefore, first deal with prayers (c)(i) and (ii) of the statement of claim and hold that the plaintiff is entitled to set off the balance of the purchase price due to the defendants from the liquidated damages due to him from the defendants. Apart from the fact that learned counsel for the defendants had conceded to the set-off, the case of *SEA Housing Corp Sdn Bhd* v *Lee Poh Choo*[1] had propounded that:

> the respondent in this case did not breach the agreement when she withheld payment of the amount demanded by the appellant. The respondent's cross-claim and the appellant's claim arose out of the same transaction and are closely connected with each other. The respondent's cross-claim was so closely connected with the appellant's demand that it would be manifestly unjust to allow the appellant to enforce payment without taking into account the respondent's cross-claim.

The Privy Council, in its decision in *Loh Wai Lian* v *SEA Housing Corp Sdn Bhd*,[2] in stating that the liquidated damages could be calculated and ascertained at a particular date and that until ascertained it does not become due and cannot be sued for, however agreed with the original decision of the learned senior assistant registrar who gave summary judgment to the purchaser for the liquidated

damages claimed. This was because the period of calculation had by then been completed and liquidated damages were therefore ascertainable and calculable. Similarly, in the case before me, the liquidated damages could be calculated once the termination date had been ascertained.

Since both counsel left it to the court, I held that the relevant date should be the date water and electricity were installed on 2 February 1989 following *Syarikat Lean Hup (Liew Brothers) Sdn Bhd* v *Cheow Chong Thai*[3] which had been affirmed by the Supreme Court on 19 April 1989 but where the written judgment has yet to be released and reported.

With the liquidated damages and period of calculation ascertained, I need only to decide on prayer (a) of the statement of claim as no order is necessary for prayer (b) since water and electricity had in fact been installed. With the plaintiff already registered as owner and having ordered that the plaintiff is to pay the balance due to the defendants, after setting off the liquidated damages to the plaintiff at prayer (c), at 10% pa interest calculated daily as provided under cl 8 of the agreement and to which counsel for the plaintiff had agreed to pay, I granted order in terms for prayer (a) within two weeks of the decision after that payment has been made. In the circumstances, I ordered each party to bear their own costs.

Before I conclude, and although my ruling did not mention the rate of interest for the liquidated damages, despite the fact that the plaintiff had prayed for 8% pa, I would find that the interest rate should be at 10% pa calculated daily as provided in cl 18 of the agreement. In view of the legal questions involved, I had also granted the defendants leave to appeal.

Order accordingly.

Solicitors: *Lalchand, Nawawi, Phang & Co*; *WY Chan & Roy*; *LA Gomes & Co.*

Reported by *Yap Shao Sin*

See Leng Yap lwn Lee Moong Lin Dan Lain-Lain

MAHKAMAH TINGGI (KUALA LUMPUR) — GUAMAN SIVIL NO C150 1985
ABDUL RAZAK H
28 OGOS 1989

Kontrak — Konsesi balak — Pemindahan konsesi — Pemindahan menyalahi undang-undang — Tiada apa-apa tuntutan boleh dibuat oleh pihak-pihak dalam perkara itu

Di dalam kes ini, pertikaian timbul daripada pengurusan konsesi balak. Konsesi balak telah diberi kepada Syarikat Ulu Bukau dan mengikut konsesi itu, syarikat itu tidak dibenarkan di bawah lesennya memindah haknya itu kepada mana-mana pihak. Bagaimanapun, mengikut defendan, ia telah membeli konsesi itu dari Syarikat Ulu Bakau itu dan berkongsi dengan plaintif dan bersama menubuhkan syarikat untuk menggunakan lesen konsesi itu. Pertikaian telah timbul antara pihak-pihak itu dan plaintif telah menuntut beberapa perkara daripada defendan, termasuk kira-kira syarikat dan kira-kira operasi.

Diputuskan, menolak tuntutan plaintif:
Pemindahan konsesi itu adalah menyalahi undang-undang dan mana-mana pihak tidak berhak membuat sebarang tuntutan terhadapnya. Oleh kerana itu, tuntutan plaintif ditolak dengan kos.

[In this case, a company, Syarikat Ulu Bukau, had obtained a timber concession. The first defendant alleged that he had bought the concession from the company and had combined with the plaintiff and the other defendants to work the timber concession and for that purpose had formed a company. The condition of the licence for the timber concession in this case was that it was non-transferable. Disputes arose between the parties and the plaintiff brought an action against the defendants, inter alia, for accounts of the company and accounts of the operations. It was held that as the transfer was illegal, no action could be brought by any of the parties relating to it. The action was therefore dismissed with costs.]

Kes-kes rujukan
1 *Nam Seng & Co* v *Wing Yew Sdn Bhd* [1978] 2 MLJ 198 (diikut)
2 *Lo Su Tsoon Timber Depot* v *Southern Estate Sdn Bd* [1971] 2 MLJ 161 (diikut)

PS Gill bagi pihak plaintif.
Soo Lim Pang bagi pihak defendan.

Cur Adv Vult

Abdul Razak H: Pihak plaintif di dalam kenyataan tuntutannya berkata bahawa defendan kesatu dan seorang bernama Faam Ah Kew, sebagai pekongsi di dalam sebuah syarikat bernama Nanyang Trading (disebut di sini sebagai 'NTC'), kira-kira dalam bulan Julai 1978 telah menjemput pihak plaintif menjadi seorang pekongsi yang berhak sama rata (equal partner) dengan defendan kesatu di dalam syarikat tersebut. Dalam bulan Ogos 1978, atas permintaan pihak defendan kesatu, NTC telah bersetuju melabur sebanyak $60,000 di dalam satu perkongsian (partnership), yang diberi nama East Malaysia Trading